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JUDICIAL ENFORCEMENT OF RESTRICTIVE COVENANTS IN THE UNITED STATES

YI-SENG KIANG*

ON MAY 3, 1948 THE SUPREME COURT of the United States handed down two decisions prohibiting judicial enforcement of racial restrictive covenants on real property¹ It has been a peculiar feature of American life that residential segregation of designated minority groups from certain prescribed areas is a common practice in all major cities. This policy of racial discrimination at first was enforced by municipal ordinance, beginning with that of Baltimore in 1910, and quickly followed by Atlanta, Richmond, Louisville, and other cities, until it was held unconstitutional by the Supreme Court in 1917² Thereafter restrictive covenants became the principal weapon of enforcing segregation through judicial tribunals. Thirty-two years elapsed before the Supreme Court was finally prepared to take up the constitutional issue of their enforceability by the courts; in this period the racial covenant had been skillfully developed into an insuperable barrier against minorities in their attempt to obtain decent living quarters. At present when the postwar shortage of housing is most acute, it became at once clear how desperate has been the plight of the

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¹ *Shelley v. Kraemer* (No. 72), *McGhee v. Sipes* (No. 87) 68 S. Ct. 836 (1948), *Hurd v. Hodge* (No. 290), *Urciolo v. Hodge* (No. 291) 68 S. Ct. 847 (1948).

² *Buchanan v. Warley*, 245 U.S. 60, 38 S. Ct. 16 (1917).

excluded groups. Now that these private agreements have been denied their force of judicial sanction, it is the purpose of this article to discuss their nature and scope, their legal status before the recent decisions, the reasons for these decisions and their general effects on minorities, and finally certain international aspects of the issues involved.

THE NATURE AND SCOPE OF RESTRICTIVE COVENANTS

For the purposes of this article, a restrictive covenant may be defined as a condition in deeds or a private agreement between property owners excluding designated groups of persons from the ownership or occupancy of real property because of their race, color, creed, or national origin. The basic aim of these restrictions renders it irrelevant to inquire whether the excluded person is a citizen of the United States or whether his social and economic station in life deserves any consideration, a person is excluded solely because of what he is, not because of what he does.

In general, there are three kinds of restrictive covenants: (1) those restricting sale, lease, conveyance to, or ownership by members of a designated racial or religious group, (2) those restricting use or occupancy by that group; and (3) those restricting both ownership and use or occupancy by that group.³ An example of the first kind is found in a covenant which provides "that said lot shall never be rented, leased, sold, transferred, or conveyed unto any Negro or colored person."⁴ One of the second is contained in a common provision. "This property shall not be used or occupied by any person or persons except those of the Caucasian race."⁵ The third is illustrated by "the restriction that no part of said premises shall be sold, given, conveyed or leased to any Negro or Negroes, and no permission or license to use or occupy any part thereof shall be given to any Negro."⁶ The parties to a covenant involve not only the interested group of property owners but also cooperating agencies such as real estate boards or brokers or neighborhood improvement associations. When newly developed lands are subdivided into individual lots for sale to prospective home owners, it is now almost a universal practice for the subdivider or grantor to write into the title deed to property the usual conditions

³ Clark, Tom C., Attorney General, and Perlman, P. B., Solicitor General, Brief for the United States as Amicus Curiae in Nos. 72, 87, 290, 291 in the Supreme Court of the United States, October Term, 1947, p. 26.

⁴ *Hurd v. Hodge* (No. 290), *Urciolo v. Hodge* (No. 291) note 1 *supra*.

⁵ *McGhee v. Sipes* (No. 87) note 1 *supra*.

⁶ LONG AND JOHNSON, *PEOPLE VS. PROPERTY RACE RESTRICTIVE COVENANTS IN HOUSING* 21 (1947)

of racial restrictions so that they shall be permanently barred to the excluded groups; this practice is alleged by real estate promoters to make the land values secure.⁷

When a covenant is executed by a number of parties, it is always officially recorded with the competent office of the county or city so that it serves constructive notice to all subsequent purchasers or occupants including the remotest grantees and tenants who must be aware of its terms of restriction.⁸ It is not infrequent that the latest buyer and seller were not parties to the original agreement with the burdens of which they were charged.

Regarding the period of validity most covenants run from ten to sixty years with provision of automatic renewals while a number of them carry no time limit and are therefore perpetual.⁹

While it is true that the institution of racial covenants is directed against Negroes who have suffered most as the largest single minority race in the United States, the restrictions are equally applicable to other minorities as well. The tendency is to use vague generic terms such as "Non-Caucasians" or "colored persons" to include all persons not of pure white blood in the restricted groups. Nevertheless, specific covenants have been executed against persons whose ancestry can be traced to Chinese, Japanese, Korean, Filipino, Hindu, Ethiopian, Arabian, Syrian, Persian, Armenian, Mexican, Greek, or Spanish extraction; as well as against Jews, Latin-Americans, Hawaiians, Puerto Ricans, and American Indians.¹⁰ In some instances the restricted members are identified by indirect reference such as Armenians were called "descendants of former residents of the Turkish Empire," or Chinese were called "members of the Mongolian race."¹¹ In others exclusion is extended to religious groups, some of whom belong to the white race. Thus we find that covenants have been used against ownership or occupancy of property "by any person who belongs to any race, creed or sect which holds, recognizes or observes any day of the week other than the first day of the week to be the Sabbath."¹² This would certainly include the Seventh Day Adventists, many of whom are pure

⁷ *Id.* at 10-11.

⁸ Attorney General Clark, note 3 *supra*, at 27

⁹ *Id.* at 26.

¹⁰ Miller, L., *The Power of Restrictive Covenants*, 36 SURVEY GRAPHIC, (No. 1 January 1947), 46, Consolidated Brief for Petitioners in *Hurd v. Hodge* and *Uriolo v. Hodge* (Nos. 290-291) at 90-91. Note 1 *supra*.

¹¹ Miller, L. *Race Restrictions on Ownership or Occupancy of Land*, 7 LAWYERS GUILD REVIEW 99; *Shelley v. Kraemer* (No. 72), note 1 *supra*.

¹² Abrams, A., *Homes for Aryans Only*, 3 COMMENTARY (No. 5, May 1947) 421.

white persons! In still others, "Jews or persons of objectionable nationality" or "any person of the Semitic race, blood, or Jews, Hebrews, Persians, and Syrians" have also been named.¹³ Finally restriction has been leveled against "persons of a race whose death rate is at a higher rate than that of the white or Caucasian race."¹⁴ The extremity of the restrictions is governed only by the whim and caprice of the covenantor and the standard of their inclusiveness is measured only by the degree of his intolerance, bigotry, and prejudice. The sole exception to racial restrictions is found in some covenants where proscribed persons can live on the premises of the restricted property only because they are there as servants, janitors, or chauffeurs. The convenience of availability of manual labor has made this exception a standard provision in title deeds issued by many real estate companies.¹⁵

Unreasonable as these restrictions were, the sinister mode of their application has in some cases defied imagination of decent society. In the recent case of *Pearce v. Crocker* in the Superior Court of Los Angeles County (No. 508, 294) it was found that the plaintiffs obtained a decree to evict the white defendant Crocker's wife, who is a three-fourths Seneca Indian, and their three daughters from a home in Westwood, which they both own but in which only the husband can live because he is a white against whom the racial restriction does not apply. A few years ago a Chinese university professor who is married to a white American bought a home in a restricted area in West Los Angeles, but because of his national origin and in spite of the mixed marriage they were forced to sell it at a loss; the wife can stay but the husband cannot in a home of their own. In another case in Maryland, *Garber v. Tushin*,¹⁶ we find that the plaintiffs sought an injunction to prevent Mrs. Tushin, who is a gentile, from permitting her husband, who is a Jew, against whom the restriction applies, to occupy the home owned by both. In all these cases it was maintained by plaintiffs or parties who assert an interest in them that the continuing occupancy of the restricted persons was causing "irreparable damage" to them! It has been observed with an ironic note that even under the Nazi "Nuremberg Laws" the members of a mixed marriage family would not have been required to move from their homes!¹⁷

¹³ Consolidated Brief, note 10 *supra*, at 91.

¹⁴ *Id.* at 91.

¹⁵ Long, *Race Restrictive Covenants in Housing*, note 6 *supra* at 21.

¹⁶ *Garber v. Tushin*, Equity 12894, Circuit Court of Montgomery County, Maryland, complaint filed April 11, 1947, the *Washington Post*, September 17, 1947, p. 1, col. 3.

¹⁷ Consolidated Brief, note 10 *supra* at 92.

In April 1944, the Blackstone Park Home Owners Association of Detroit, Michigan took action to evict Mrs. Joseph G. Bell and her eight children from their home because she and her husband were of mixed European and Chinese parentage. The husband's father was American and the wife's English; both had Chinese mothers. The Association has a racial covenant which permits only persons of "pure, white, unmixed, Caucasian race" to reside in the area in question.¹⁸ Thus in a pure white community an Eurasian cannot be regarded as or pass for a Caucasian, and when a Seventh Day Adventist is subject to a restricted covenant, even a Caucasian is not a Caucasian.

The enumeration of some minorities as a restricted group suggests a certain regional pattern reflecting the particular prejudice of the locality concerned. In general, the Negroes are singled out as a class in the South and the Midwest, whereas in the Southwest it is common to exclude Mexicans and American citizens of Mexican descent, *e. g.*, "persons commonly called Mexicans." In the Pacific Coast states, restrictions apply to all "non-Caucasians" which would obviously include Asiatics.¹⁹

With a view to showing the order of precedence taken by minority groups other than Negroes as excluded persons, it is interesting to study the following table prepared by the Department of Race Relations of the American Missionary Association:²⁰

TABLE 14

Groups Other Than Negroes, Considered Objectionable by Neighborhood Improvement Associations, Chicago and Detroit, 1944

	<i>Number</i>	<i>Per cent</i>
Japanese, Chinese, Mongolians, Non-Caucasians....	16	31.3
Mexicans	5	9.9
Jews	6	11.7
Italians, Poles, Greeks.....	3	5.9
None	16	31.3
Not given	5	9.9
Total (including repetitions).....	51	100.00

From the above figures it is evident that next to the Negroes "Asiatics" or "Orientals" are considered as most objectionable by almost a third of the organizations which expressed their opinion. They are

¹⁸ MONTHLY SUMMARY OF EVENTS AND TRENDS IN RACE RELATIONS (May 1944).

¹⁹ McGovney, D. O., *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Conditions in Deeds is Unconstitutional*, 33 CALIF. L. R. 15, (1945).

²⁰ Long & Johnson, note 6 *supra*, at 47-48.

followed by Jews, Mexicans, Italians, Poles, and Greeks among the undesirable groups. This is at any rate an accurate report on the situation in Chicago and Detroit to which these figures apply. In the Pacific Coast states, particularly in California where racial prejudice against the Chinese had a long historical background, it would be naive to think that they are regarded with more social graces than the Negroes within the framework of restrictive covenants. If it seems at times that the Chinese have been accorded in some communities a little better treatment than other "non-Caucasians," it is probably because once they were given an opportunity to reside in a white district. They, like any other people, would be found to possess about as many traits of virtues and failings as their white neighbors. In general, it must be conceded that in the estimation of the covenantors the yellow race is little better than the black race.

The question of enforcement of racial covenants usually comes up when a neighboring property owner who is a party thereto or otherwise subject to the terms thereof seeks to redress their violation by injunctive relief in the courts. The relief sought usually takes one or more of the following forms: (1) prevention of occupancy by the excluded person, (2) his eviction from the premises of his property; (3) forfeiture of his title deeds if such a penalty for his ownership is included in the covenants.²¹

LEGAL STATUS OF RESTRICTIVE COVENANTS PRIOR TO SUPREME COURT DECISIONS OF 1948

According to the Attorney General of the United States, restrictive covenants of one kind or another were enforced by courts in nineteen states and in the District of Columbia.²² These states are Alabama, California, Colorado, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Texas, West Virginia, and Wisconsin. The other twenty-nine states are silent on the issue.

It is interesting to note that the first case involving the enforcement of a restrictive covenant was decided in California and concerned the right of a Chinese to lease a laundry site in San Diego. In 1892 the Circuit Court of the United States for the Southern District of California refused to enforce a covenant in a deed that the grantee should never rent the property "to a Chinaman."²³ The court said:

²¹ Attorney General Clark, note 3 *supra*, at 27.

²² Attorney General Clark, note 3 *supra*, at 40-42.

²³ *Gandolfo v. Hartmen*, 49 Fed. 181 (1892).

It would be a very narrow construction of the constitutional amendment in question, and of the decisions based upon it, and a very restricted application of the broad principles upon which both the Amendment and the decisions proceed, to hold that while state and municipal legislatures are forbidden to discriminate against Chinese in their legislation, a citizen of a state may lawfully do so by contract which the courts may enforce. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other.

The court was of the opinion that enforcement of this covenant would be in violation of the equal protection of the laws under the Fourteenth Amendment.²⁴ It was unfortunate that the ruling of this case was not supported by other courts in subsequent cases involving the same question and was completely ignored by the Supreme Court of California in 1919 when it held that a racial covenant was valid because it was a restriction on "use."²⁵

Before the Supreme Court decisions of May 3, 1948, were rendered, it was commonly believed that the question of judicial enforcement of restrictive covenants in their constitutional aspects had been settled by the Supreme Court in *Corrigan v. Buckley*.²⁶ In that case Corrigan, Buckley, and twenty-eight other white property owners in the District of Columbia made a covenant not to sell or lease their land to Negroes. Later Corrigan contracted to sell her lot to Curtis, a Negro, whereupon Buckley filed a suit in equity in the trial court of the District of Columbia naming both Corrigan and Curtis as defendants and enjoining the former from selling and the latter from buying or occupying that lot. The defendants moved to dismiss the suit on the ground that the covenant in question is void because it violates the Fifth, the

²⁴ The first section of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The amendment came into force as a part of the Constitution on July 28, 1868. Eighteen years later in the celebrated case of *Yick Wo v. Hopkins* (118 U. S. 356, 6 S. Ct. 1064) the Supreme Court held that a Chinese laundryman who was denied a license to operate his business was denied the equal protection of the laws under that Amendment. That decision also established the meaning of the word "person" which is not to be restricted by the definition of the word "citizen" in the first clause but is to be taken to include all individuals within the United States regardless of race, color or nationality. In the same year (1886) the Court held that the word "persons" also applies to corporations. *Santa Clara County v. Southern Pacific Railroad Co.* 118 U. S. 394, 6 S. Ct. 1132 (1886).

²⁵ *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 Pac. 596 (1920).

²⁶ 271 U. S. 323, 46 S. Ct. 521 (1926).

Thirteenth, and the Fourteenth Amendments of the Constitution. These motions were denied, the injunction was granted, and the judgment was confirmed by the Court of Appeals. The case then went to the Supreme Court on appeal and not on certiorari.

The Supreme Court was primarily concerned with the question of whether a substantial issue had been raised that would confer jurisdiction on the Court. With regard to the due process of law clause of the Fifth Amendment the Court held that:

This contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the code provision, it was not raised by the petition for the appeal or by an assignment of error either in the Court of Appeals or in this court, and it likewise is lacking in substance.

Secondly the Fourteenth Amendment was not applicable in this case for the simple reason that the District of Columbia is not a state to which that Amendment bears its legal relationship. Referring to the Thirteenth Amendment the Court held that restrictive covenants did not create slavery or involuntary servitude within the meaning of that Amendment and therefore they are not void *ab initio*. The Court concluded "that neither the constitutional nor statutory questions relied on as grounds for the appeal to this Court have any substantial quality or color of merit, or afford any jurisdictional basis for the appeal."²⁷

Thus it is clear that the central question whether courts can enforce restrictive covenants was not decided since it was not raised in that case. Yet the mistaken impression that it had been settled persisted for more than twenty years before the confusion created by that decision was finally swept away by the Supreme Court recently.²⁸

As it has already been noted, the question of racial residential segregation by state legislation or municipal ordinance had been declared unconstitutional by the Supreme Court in 1917 in the famous case of *Buchanan v. Warley*.²⁹ In that case an ordinance of the city of Louisville, Kentucky prohibited colored persons from residing in blocks where the greater number of residents were white persons and the same prohibition applies to the latter in blocks where the greater number of residents were colored. Buchanan, a white property owner, brought action against Warley, a Negro, for the specific performance

²⁷ 271 U. S. 323, 331, 46 S. Ct. 521, 524 (1926).

²⁸ See *infra*.

²⁹ Note 2 *supra*.

of a contract of sale of Buchanan's lot to Wharley Wharley argued that he was excused from the obligations of the contract inasmuch as he was not entitled to occupancy of the property which was a condition of the sale. The Court said:

The concrete question here is May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the States, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to enquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant.³⁰

To this question the Court answered:

We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law That being the case the ordinance cannot stand.³¹

Restrictive covenants had not come into extensive use before the migration of Negroes from the South to the North and the Middle West in the second decade of the current century and before the process of their urbanization took momentum during and after that decade. At first they were used as a subsidiary weapon to state and municipal enactments in enforcing racial segregation, but after the Supreme Court invalidated this pattern of statutory segregation they became the primary means of perpetuating the exclusion of minority groups from good urban areas. In recent years the wholesale and still expanding use of this instrument has rendered practically all newly developed urban areas inaccessible to colored persons while similar covenants are concluded to fringe the old established colored or other minority districts. In the words of the Report of the President's Committee on Civil Rights, the present situation is that

where old ghettos are surrounded by restrictions, and new subdivisions are also encumbered by them, there is practically no place for the people against whom the restrictions are directed to go. Since minorities have been forced into crowded slum areas, and must ultimately have access to larger

³⁰ 245 U. S. at 75.

³¹ *Id.* at 52.

living areas, the restrictive covenant is providing our democratic society with one of its most challenging problems.³²

It has been reported that before the recent decisions of the Supreme Court there were approximately 250 suits pending in the courts of the various states; of these suits it has been estimated that nineteen were filed in the courts of California. There were two cases which came before the Superior Court of Los Angeles County and in which two American citizens, one of Chinese and the other of Korean descent and both veterans decorated in the last war, bought their homes in a restricted district and were sued to vacate their premises. Before these cases were tried on their merits, defendants petitioned the Supreme Court of California for a writ of prohibition which would prevent the trial court from proceeding with the case. The petition was denied and both cases reached the Supreme Court of the United States on certiorari. On May 10, 1948, one week after the leading decisions were pronounced, the petition was granted and "the order denying a writ of prohibition is vacated and the case is remanded to the Supreme Court of California in order to enable it to reconsider its ruling."³³ So far as the writer knows, these two were the only cases which originated in Los Angeles and went to the Supreme Court from California.

It is significant that the President's Committee on Civil Rights in its report released in 1947 recommended "a program of action" calling for "the elimination of segregation, based on race, color, creed, or national origin, from American life."³⁴ In the field of housing it specifically recommended the "enactment by the states of laws outlawing restrictive covenants" and the "renewed court attack, with intervention by the Department of Justice"³⁵ upon them. These measures are considered necessary and urgent so as "to strengthen the right to equality of opportunity" which should be enjoyed by all minority groups. The Report further comments:

The effectiveness of restrictive covenants depends in the last analysis on court orders enforcing the private agreement. The power of the state is thus utilized to bolster discriminatory practices. The Committee believes that every effort must be made to prevent this abuse. We would hold this belief under any circumstances, under present conditions, when severe housing

³² TO SECURE THESE RIGHTS, REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, 69 (1947, Government Printing Office)

³³ *Tom D. Amer v. Superior Court of Calif.*, in and for the County of Los Angeles, Supreme Court of the United States, (No. 429), *Yin Kim v. same*, (No. 430) 68 S. Ct. 1069 (1948).

³⁴ Note 32 *supra* at 166.

³⁵ *Id.* at 169.

shortages are already causing hardship for many people of the country, we are especially emphatic in recommending measures to alleviate the situation.

THE RECENT SUPREME COURT DECISION

On May 3, 1948 Mr. Chief Justice Vinson delivered two separate opinions on four cases³⁶ originating from Missouri, Michigan, and the District of Columbia and all involving the validity of court enforcement of restrictive covenants against Negro property owners who are direct participants in these cases. Both decisions were rendered by a unanimous court of six members, the other three having disqualified themselves from the cases; it was learned that two of the justices were owners of property covered by restrictive covenants.³⁷ An unprecedented amount of public interest was displayed in the outcome of these cases by the fact that twenty-four briefs of Amicus Curiae were filed by organizations and individuals, the largest number ever presented before the Supreme Court in a private civil case.³⁸ The government of the United States itself, as represented by the Attorney General, argued as a friend of the court against the judicial enforceability of restrictive covenants; these arguments were ably presented in a learned and comprehensive brief with copious citations of authorities.

All these cases came to the Supreme Court on certiorari to the lower courts from which they were appealed. In the Missouri case of *Shelley v. Kraemer* (No. 72, October Term, 1947) petitioner Shelley and his wife, who are Negroes, bought on August 11, 1945, a piece of property in St. Louis containing a recorded agreement which provides in part:

no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by the people of the Negro or Mongolian Race.

On October 9, 1945 respondents who were owners of other property but parties to this restrictive agreement brought suit in the circuit

³⁶ The two District of Columbia cases were consolidated for trial by the District Court.

³⁷ Justices Robert H. Jackson, Wiley B. Rutledge, and Stanley F. Reed took no part in the consideration or decision of these cases. The first two were reported to own covenanted property. *New York Times*, May 9, 1948.

³⁸ Among these were the National Association for the Advancement of Colored People, the Congress of Industrial Organizations, the American Federation of Labor, the American Jewish Congress, the American Civil Liberties Union, the American Indian Congress, the American Association for the United Nations, the Committee on Social Action of the Congregational Church, the Council of Protestant Churches of New York, the American Veterans Committee, etc.

court of that city to restrain the petitioners from taking possession of the property and to forfeit their title to the same. The trial court denied the respondents their requested relief but on the ground that the restrictive agreement in question was not effective due to a lack of sufficient signatures. The Supreme Court of Missouri, however, reversed the judgment of the lower court which was directed to grant the relief for which respondent had prayed, it held that the restrictive agreement was effective and its enforcement did not violate any rights guaranteed by the Constitution. When the decision was rendered, petitioners were occupying the property as their home.

The second case is *McGhee v. Sipes* (No. 87, October Term, 1947). There petitioners bought and occupied a piece of property in Detroit, Michigan on November 30, 1944. The property in question contained a restrictive covenant executed in June, 1934 and subsequently recorded and effective until January 1, 1950, providing as follows: "This property shall not be used or occupied by any person or persons except those of the Caucasian race." On January 30, 1947 respondents who are owners of other property subject to the terms of the restrictive agreement brought suit in the circuit court of Wayne County which after a hearing ordered petitioners to move from the property within ninety days and restrained them from using or occupying the premises in the future. The decree was affirmed by the Supreme Court of Michigan setting aside the petitioners' contention that they had been denied rights protected by the Fourteenth Amendment of the Constitution.

The third and the fourth of these cases are *Hurd v. Hodge* (No. 290, October Term, 1947) and *Urciolo v. Hodge* (No. 291, October Term, 1947) and they came to the Supreme Court from the Circuit Court of Appeals for the District of Columbia. In both cases petitioners are Negroes and bought property in Washington, D C. from white owners under deeds which contained the following covenant: "that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person, under a penalty of Two Thousand Dollars (\$2,000) which shall be a lien against said property." The covenant was made in 1906 but does not impose any limitation of time. As in the other cases, respondents, who own other property but are parties to the covenant, brought suit in the District Court which consolidated the two cases for trial purposes and subsequently entered a judgment nullifying the title deeds of the Negro petitioners, enjoining petitioners

Urciolo and Ryan, the white property owners and sellers, from leasing, selling, or conveying the properties to any Negro or colored person, and directing the Negro petitioners to vacate the premises within sixty days. The judgment was affirmed, with one strong dissent,³⁹ on appeal by the United States Court of Appeals for the District of Columbia.

Although in both decisions judicial enforcement of restrictive covenants has been declared invalid, different legal arguments were used by the Court in arriving at the same conclusion. In the cases from Missouri and Michigan, the decision was based on the proposition that "in granting judicial enforcement of the restrictive covenants in these cases, the States have denied petitioners the equal protection of the laws" guaranteed by the Fourteenth Amendment and that judicial action constitutes the kind of state action within the meaning of the equal protection clause of that Amendment. Having so decided, the Court did not go into the other constitutional questions such as whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States. In the District of Columbia cases, the Court applied the first section of the Civil Rights Act of 1866 and gave consideration to the public policy of the United States in support of its decision.

It must be indicated at this point that in neither decision was the validity of the restrictive covenant itself attacked or questioned by the Court. In fact, the Court made it clear in *Shelley v. Kraemer* that "the restrictive covenants standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of these agreements are effectuated by voluntary adherence to their terms, it would appear that there has been no action by the State and the provisions of the Amendment have not been violated." In *Hurd v. Hodge*, it was likewise held that "the Statute [the Civil Rights Act of 1866] does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms."

³⁹ Justice Edgerton dissented on five general grounds, each independent of the other four, as follows: (1) the covenants are void as unreasonable restraints on alienation; (2) they are void because they are contrary to public policy; (3) their enforcement by injunction is inequitable; (4) it violates the due process clause of the Fifth Amendment; and (5) it violates the Civil Rights Act (Revised Statutes, Sec. 1978, 8. U. S. C., Sec. 42). In addition to these he also based his dissent on two special grounds: (1) enforcement of the covenant would defeat its original purpose since the neighborhood is no longer white and since Negroes will pay more than whites for the same property; and (2) the injunctions are against both transfer and occupancy and broader than the covenant which did not forbid use or occupancy. Quoted in Consolidated Briefs, 5.

It is worth noting that the court has in these decisions clarified its own ruling in *Corrigan v. Buckley* which, as it has already been referred to above, had been for twenty-two years misinterpreted as having settled the issue of enforceability of restrictive covenants.⁴⁰ "The only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue before this court on appeal," said the Court in *Shelley v. Kraemer*, "was the validity of the covenant agreements as such." The question whether they can be enforced by courts under the Fifth Amendment was not "properly before the Court." "Accordingly," the Court concluded, "the appeal was dismissed for want of a substantial question. Nothing in the opinion of this Court, therefore, may properly be regarded as an adjudication on the merits of the constitutional issues presented by these cases, which raise the question of the validity, not of the private agreements as such, but of the judicial enforcement of those agreements." This conclusion was repeated in *Hurd v. Hodge* and *Urciolo v. Hodge*.

The Court also made a distinction between the present cases and those involving racial residential segregation by state enactment or municipal ordinance which had been ruled in violation of the Fourteenth Amendment in *Buchanan v. Warley*⁴¹ in 1917 and in subsequent⁴² cases.

In the present cases, the Court maintained that the pattern or scope of discrimination is a matter of agreement among private individuals and that "participation of the State consists in the enforcement of the restrictions so defined." The question at issue is, does this participation by the courts of the state constitute an action of the state within the meaning of the Fourteenth Amendment? After citing a number of authorities, the Court concludes:

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the

⁴⁰ McGovney, note 19 *supra* at 34-36.

⁴¹ Note 2 *supra*.

⁴² *Harmon v. Tyler*, 273 U.S. 668, 47 S. Ct. 471 (1927), *City of Richmond v. Deans*, 281 U.S. 704, 50 S. Ct. 459 (1930).

operation of those provisions simply because the act is that of the judicial branch of the state government.

The Court then proceeds to consider the question whether there has been state action in the instant cases "in the full and complete sense of the phrase." It says:

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers, and contracts of sale were accordingly consummated. It is clear that but for the active intervention of state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint. These are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The Court fully realizes that the task of determining whether an act of the state violates constitutional provisions cannot be undertaken lightly; "where, however, it is clear that the action of the state violates the terms of the fundamental charter, it is the obligation of this Court so to declare." The Court therefore concludes:

Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race and color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this purpose in mind. Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment.

According to the opinion of the Court, the question of restriction on use did not arise in these cases. The restrictions were entirely directed "toward a designated class of persons" which is defined wholly in terms of "race or color." Regarding the respondents' argument that the courts may also be requested to enforce restrictive covenants against white persons, the Court has not found any case supporting it;

even if there were any, it would have been of no avail for the reason that "equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

In the District of Columbia cases, the Court, as it has been noted, cited as one of the two legal bases for its ruling Section 1978 of the Revised Statutes, which, derived from the first Section of the Civil Rights Act of 1866, provides as follows: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property" Since all the petitioners in the two cases are found to be citizens of the United States, and since the District of Columbia must be included within the phrase "every State and Territory," there can be no doubt as to "the construction to be given to the relevant provisions of the Civil Rights Act in their application to the Courts of the District of Columbia." The Court says:

That the Negro petitioners have been denied that right by virtue of the action of the federal courts of the District is clear. The Negro petitioners entered into contracts of sale with willing sellers for the purchase of properties upon which they desired to establish homes. Solely because of their race and color they are confronted with orders of court divesting their titles in the properties and ordering that the premises be vacated. White sellers, one of whom is a petitioner here, have been enjoined from selling the properties to any Negro or colored person. Under such circumstances, to suggest that the Negro petitioners have been accorded the same rights as white citizens to purchase, hold and convey real property is to reject the plain meaning of language. We hold that the action of the District Court directed against the Negro purchasers and the white sellers denies rights intended by Congress to be protected by the Civil Rights Act and that, consequently, the action cannot stand.

The other legal basis for this decision is to be found in the public policy of the United States against which it will be to enforce the restrictive covenants in these cases. In this connection the court states:

We are here concerned with action of federal courts of such a nature that if taken by the courts of a State would violate the prohibitory provisions of the Fourteenth Amendment. *Shelley vs. Kraemer, supra*. It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the states.

Mr. Justice Frankfurter, concurring in the unanimous opinion, stated that the rule of good conscience in equity ought to be sufficient to justify the holding of the decision. It was stated that "in good conscience, it cannot be the exercise of a sound judicial discretion by a federal court to grant the relief here asked for when the authorization of such an injunction by the states of the Union violates the Constitution. This is to me a sufficient and conclusive ground for reaching the court's result."

On May 10, 1948 the Supreme Court in the light of the two decisions rendered the week before, reversed the judgment of the lower court in a Columbus case in which a Negro preacher was enjoined from occupying the parsonage of his own church.⁴⁸

GENERAL EFFECTS OF THE DECISION

Although the Supreme Court invalidated statutory racial segregation in 1917, thirty-one years elapsed before it was prepared to declare its position on the judicial enforcement of restrictive covenants. During this long period restrictive covenants developed into a formidable instrument which has effectively barred almost all minority groups in the United States from predominantly white urban neighborhoods. Now that they have been denied the legal force of execution it is appropriate to speculate upon the general effects of the recent decisions. If one can hazard a guess into the future, it is unlikely that there will be a wholesale invasion of colored persons into white residential districts. First, the white property owner must be willing to sell or to rent, and the colored person must be able to pay for what he wants; it takes two to make a bargain which above all is governed by the economic laws of supply and demand. Secondly the social force of racial prejudice must still be reckoned with, since it is the freedom of those who share common prejudices to enter into private covenants of racial restrictions. While it is true that these covenants will be in the nature of "gentlemen's agreements" and their effectiveness will depend upon the good faith of the parties who conclude them, their continued existence will keep alive the tradition of racial prejudice in many communities where minority groups reside in large numbers.

In areas where there are already mixed racial groups, it is natural to see white property owners wanting to make way for them and it is

⁴⁸ Trustees of the Monroe Avenue Church of Christ v. Perkins, No. 153, 68 S. Ct. 1068 (1947).

reasonable to expect that a perceptible change of occupancy will be seen in these neighborhoods as time goes by. It is also probable that excluded persons of substantial means may now live in places which hitherto were inaccessible to them. In general, however, the racial composition of residential areas which are exclusively or predominantly white will not be altered for social and economic reasons.

The real significance of the latest decisions lies in the fact that restrictive covenants can no longer be used as a legal weapon of enforcing racial segregation. The judicial arm of the American government will not be on the side of those who wish to maintain it as an oddity of American life. These private agreements have been shorn of the coercive power of the state for their sanction and they merely represent a manifestation of personal feelings of the parties concerned towards other races. Thus an important pervasive gap is closed between American ideal and practice regarding the enjoyment of basic civil rights in the United States.

From the Chinese point of view these decisions must be regarded as another landmark in their struggle for equality before the laws of the United States, and for that reason alone they must be hailed as a great act of judicial progress as was the repeal of the Chinese Exclusion Laws on December 17, 1943.

INTERNATIONAL ASPECTS OF RESTRICTIVE COVENANTS

Apart from the constitutional aspects of the validity of restrictive covenants it has been argued that the United States cannot enforce these covenants without violating her treaty obligations as a signatory to the Charter of the United Nations.⁴⁴ Article 55 (c) of the Charter provides that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Article 56 prescribes: "all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."⁴⁵ The mandatory feature of these provisions makes it clear that the United States should refrain from any action which will impair the enjoyment of "human rights and

⁴⁴ Consolidated Briefs at 108-111.

⁴⁵ In the concurring opinion of Mr. Justice Murphy, with whom Mr. Justice Rutledge joins, in the recent *Oyama* case involving the constitutionality of the California Alien Land Law, it was said. "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language

fundamental freedoms" on racial distinctions; they impose an obligation on the government of the United States not to lend its aid to the perpetuation of discriminations depriving any person of his human rights and fundamental freedoms because of his race or color. Obviously it does not make any difference whether such aid is given by the legislative, executive, or judicial branch of the American government so long as the action is a direct and official action of that government. If judicial enforcement of restrictive covenants can be construed as a state action under the Fourteenth Amendment of the Constitution, it can no less be interpreted as a governmental action which violates Articles 55 and 56 of the Charter of the United Nations. The Supreme Court has found it unnecessary to go into the international phase of restrictive covenants, but the clarity of the Charter provisions leaves little doubt as to the cogency of the arguments advanced. It is urged by the Attorney General of the United States that "even if the decrees below [in the cases before the Supreme Court] are not stricken on specific constitutional grounds, they may properly be set aside as being inconsistent with the public policy of the United States."⁴⁶

The question of restrictive covenants came up in a Canadian case in which the Ontario High Court held that a restriction against ownership of land by "Jews or persons of objectionable nationality" was invalid under Dominion public policy as well as because it was a void restraint on alienation of property under common law. Insofar as it is a matter of public policy to deny its enforcement, the court relied on the Charter of the United Nations to which Canada is a signatory and indicated that the objectives of the covenant are contrary to those of the Charter.⁴⁷

On November 19, 1946 the General Assembly of the United Nations adopted unanimously the following resolution.

and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned. And so in origin, purpose, administration and effect, the Alien Land Law does violence to the high ideals of the Constitution of the United States and the Charter of the United Nations." Mr. Justice Black, with whom Mr. Justice Douglas agrees, asks in his concurring opinion. "How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?" *Oyama v. State of California*, 68 S. Ct. 269 (1948). It is believed that this was the first time that some members of the Supreme Court had taken judicial cognizance of the United Nations Charter, the violation of which was one more reason why the California Alien Land Law should be declared unconstitutional.

⁴⁶ Attorney General, note 3 *supra* at 102.

⁴⁷ *Re Drummond Wren*, 4 Dominion L. Rep. 674 (1945). Further the court said. "The consequences of judicial approbation of such a covenant is portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants,

The General Assembly declares that it is in the higher interests of humanity to put an immediate end to religious and so-called racial persecutions and discrimination, and calls on the Governments and responsible authorities to conform both to the letter and to the spirit of the Charter of the United Nations, and to take the most prompt and energetic steps to that end.⁴⁸

Although the resolution lacks the legal force of the Charter which as a treaty is "the supreme law of the land" in the United States it is difficult to resist the strong moral obligation implied in the acceptance of this unequivocal recommendation by the members of the United Nations. In this connection it is fair to point out the constructive position taken by the government of the United States on discriminatory practices from the following letter⁴⁹ of May 8, 1946 by the then Acting Secretary of State Dean Acheson to the Fair Employment Practices Committee:

The existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. While sometimes these pronouncements are exaggerated and unjustified, they all too frequently point with accuracy to some form of discrimination because of race, creed, color, or national origin. Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries, the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged. An atmosphere of suspicion and resentment in a country over the way a minority is being treated in the United States is a formidable obstacle to the development of mutual understanding and trust between the two countries. We will have better international relations when these reasons for suspicion and resentment have been removed.

It is earnestly hoped that the federal government will continue to assume its vigilant leadership in championing the cause of unfettered enjoyment of fundamental rights by all racial groups in the United States. The decisions we have just surveyed constitute an article of faith in the fuller realization of these rights for which American democracy has stood since the days of its founding.

Catholics, or other groups or denominations. If the sale of one piece of land can be prohibited, the sale of other pieces of land can likewise be prohibited. In my opinion nothing could be more calculated to create or deepen divisions between existing religions and ethnic groups in this Province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or conversely, would exclude particular groups from particular business or residential areas."

⁴⁸ United Nations General Assembly Journal, 1st Session, No. 75, at 957

⁴⁹ Attorney General, note 3 *supra* at 119-20.